STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2007
v KEON OMARIOJI SEAY, Defendant-Appellant.	No. 269759 Oakland Circuit Court LC No. 2005-201300-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEON OMAR SEAY, a/k/a KEON OMARIOJI SEAY, Defendant-Appellant.	No. 269786 Oakland Circuit Court LC No. 2004-199297-FC

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was charged with a total of ten offenses in two separate files, which were consolidated for trial before a jury. In total, he was convicted of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, conspiracy to deliver or possess with intent to deliver marijuana, MCL 750.157a and MCL 333.7403(2)(d), delivery or possession with intent to deliver marijuana, MCL 333.7403(2)(d), conspiracy to distribute or possess with intent to distribute an imitation controlled substance, MCL 750.157a and MCL 333.7341(3), distribution or possession with intent to distribute an imitation controlled substance, MCL 333.7341(3), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), possession of a firearm during the commission of a felony, MCL 750.227b, possession of marijuana, MCL 333.7403(2)(d), and possession of a dangerous weapon (metallic knuckles), MCL 750.224(1)(d). Defendant was acquitted of an additional count of assault with intent to rob while armed, MCL 750.89.

Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 106 to 360 months for the conspiracy to commit armed robbery conviction, two to six years each for the conspiracy to deliver and delivery of marijuana convictions, one to three years each for the imitation controlled substances convictions, one to six years for the possession of cocaine conviction, one year for the marijuana possession conviction, 12 to 90 months for the dangerous weapon conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise out of a reverse-buy drug transaction with an Oakland Country Narcotics Enforcement Team (NET) undercover police officer. NET learned that defendant wanted to purchase a large amount of marijuana, and a NET officer negotiated an agreement with defendant to sell two pounds of marijuana at a discounted price of $3,500 plus one ounce of crack cocaine. Defendant and his cousin and codefendant, Antonio Williams, met the officer in a parking lot, where defendant negotiated a meeting for the following day to complete the deal. The next day, defendant gave Williams a loaded gun. When they met the officer, Williams got in the front passenger seat of the officer's vehicle, and defendant got in the back seat. Defendant gave the officer some money and showed what appeared to be crack cocaine, but he refused to give it to the officer. The officer eventually gave the defendants the marijuana and demanded the crack cocaine and the balance of the money. Defendant appeared to be stalling. Williams then pulled a handgun, pointed it at the officer's chest, demanded the return of the money, and stated, "I'll f**king kill you," and "I'm taking this sh*t[.]" Williams took the marijuana and the money, and he attempted to flee. During the robbery, defendant calmly sat in the back seat, acting as if he had no part in the robbery. The officer signaled to the backup officers, who apprehended defendant and Williams, whereupon defendant attempted to swallow the soap substance that he said was crack cocaine.

In a statement made to the police, defendant admitted that he told Williams about the deal and that Williams agreed to "go half." Defendant also admitted attempting to purchase the marijuana from the officer and possessing "fake" crack cocaine, but denied any knowledge of Williams's decision to rob the officer. Williams testified that defendant handled the negotiations, and he agreed to provide half the purchase money after defendant told him the details. Williams denied knowing that crack cocaine would be involved, but he testified that he and defendant planned to rob the officer of the marijuana, with Williams performing the robbery and running away to give the appearance that defendant was not involved. The police executed a search warrant at defendant's residence, where they found a loaded 44-caliber gun, two digital scales containing cocaine and marijuana residue, a bar of soap with a missing portion, and brass knuckles. Inside defendant's car, which was parked outside of the apartment, was a digital scale containing cocaine residue.

Defendant first argues that he was denied a fair trial by a juror observing him in shackles, and he further argues that the trial court erred by not sufficiently exploring whether the juror had so seen him. We disagree.

"Freedom from shackling is an important component of a fair trial." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). During the mid-afternoon break of the second day of trial, defense counsel stated that defendant believed that a juror saw him in shackles outside the courtroom. The matter was apparently mostly discussed off the record. However, enough was placed on the record to show clearly that the trial court adequately investigated the matter

and determined that a juror might have seen defendant in shackles, but the individual was identified as a juror sitting on a different trial elsewhere in the building. Defense counsel did not request an evidentiary hearing to inquire whether any juror saw defendant with shackles and, if they did, whether they were thereby prejudiced. See *People v Herndon*, 98 Mich App 668, 673; 296 NW2d 333 (1980). Defendant also did not challenge the trial court's conduct below, so we review this claim for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Under the circumstances, we find no error.

Defendant next argues that the evidence was insufficient to sustain his conviction for conspiracy to distribute or possess with intent to distribute an imitation controlled substance because there was no evidence that Williams knew that cocaine or an imitation controlled substance was part of the marijuana transaction. We disagree.

When assessing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Under MCL 333.7341(3), it is unlawful for a person to distribute or possess with intent to distribute an imitation controlled substance. A "person who conspires together with 1 or more persons to commit an offense prohibited by law . . . is guilty of the crime of conspiracy[.]" MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Conspiracy is a specific intent crime, requiring the intent to combine with others and the intent to accomplish an illegal objective. *Id.* To prove the intent to combine with others, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482, 485; 505 NW2d 843 (1993). For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Id*. Direct proof of a conspiracy is not essential. Rather, a conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement is required. *People v Justice* (*After Remand*), 454 Mich 334, 347; 562 NW2d 652 (1997); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

Defendant relies on Williams's trial testimony in which he denied any knowledge that cocaine or imitation cocaine was part of the marijuana transaction. But Williams also testified that he pleaded guilty of, inter alia, conspiracy to distribute an imitation controlled substance. Williams admitted that, when pleading guilty, he testified under oath that he knew about the imitation controlled substance. By testifying regarding his guilty plea, Williams established a basis for the jury to conclude that he conspired with defendant to distribute or possess with intent to distribute an imitation controlled substance. Moreover, defendant's statement to the police indicated that he had told Williams "what the deal was," including bringing soap instead of crack cocaine. Finally, defendant's and Williams's admitted discussions about the transaction and subsequent behavior is evidence of concert of action, which creates an inference of conspiracy. See *Justice* (*After Remand*), *supra*, and *Cotton, supra* at 393-394. Although defendant asserts that the evidence was insufficient to establish a conspiracy, the jury was entitled to accept or

reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant and Williams conspired to distribute or possess with intent to distribute an imitation controlled substance.

Defendant finally argues that the prosecutor's conduct denied him a fair trial. We disagree. Because defendant failed to object to the prosecutor's remarks, we review this claim for plain error affecting substantial rights. *Kimble*, *supra* at 312. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant argues that the prosecutor impermissibly appealed to the jurors' sympathy during opening statement when she stated:

> When a police officer goes to work, his main priority is to go home at the end of the shift.
>
> On October 13, 2004, that almost didn't happen for Detective Perry Dare. And he was very concerned, in fact, that he wasn't going home that night.
>
> * * *
>
> And Detective Dare, you know, wanted to get out of the car. He started to get out of the car. Get back in the car. I'll f**king kill you. I'll f**king kill you. Put your hands up.
>
> So Detective Dare put his hands up. No put them on the steering wheel. So Detective Dare put them on the steering wheel.
>
> And at that time Detective Dare will tell you he thought, "I'm not going to see my baby, and my wife if going to be a widow.

Opening statement is the appropriate time to state a fact that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). However, appeals to the jury to sympathize with the victim are improper. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Viewed in context, the remarks did not improperly suggest that the jury should convict defendant on the basis of sympathy. Moreover, the remarks were isolated and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Furthermore, during trial, the officer testified concerning Williams's actions and his fear of losing his life, which was relevant to the charge of assault with

intent to rob.[1] Additionally, in its final instructions, the trial court instructed the jurors that they should not be influenced by sympathy or prejudice, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, this claim does not warrant reversal.

We also reject defendant's claim that the prosecutor improperly vouched for prosecution witness Abonia Thomas, who testified that she was defendant's former girlfriend. Thomas also testified that on October 13, 2004, she was with defendant in her apartment and he later left driving her car without her permission. During closing argument, defense counsel argued that Thomas was bitter toward defendant as evidenced in a letter she wrote to defendant, and that she did not even know defendant's apartment number. In rebuttal argument, the prosecutor stated:

> I suppose, according to [defense counsel], that Abonia Thomas and Antonio Williams and the apartment complex manager are all in cahoots. And they must have gotten together to try to put this evidence again the Defendant, because every one of them for some reason has a bias.
>
> Actually, the letter that Abonia Thomas wrote is in evidence. It was one of the letters that was found in the apartment 208. It was post - - it was dated, postmarked anyways [sic], in June 2004.
>
> And if you recall the last words of her letter, "still love you," well obviously she still did. Because in October of 2004, she is willing to go pick up the defendant.
>
> They're still in a sexual relationship and takes him to her apartment. And she was planning on letting him use her car, just not - - at the time he took it.
>
> So I don't see that there was any bitterness there. And in fact, she's indicated to you that she's had communications with him since his arrest.
>
> There's no bias. There's no prejudice. It didn't seem to me like she had any axe to grind against the Defendant.

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, the prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). When viewed in context, the prosecutor's remarks did not suggest special knowledge that Thomas was credible, but rather used properly introduced evidence to refute

[1] The elements of assault with intent to rob while armed are (1) an assault with force or violence, (2) an intent to rob, and (3) the defendant being armed. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986).

defendant's argument that Thomas was not credible. A prosecutor is free to argue from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Additionally, the trial court's instructions that the jurors were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence, were sufficient to dispel any possible prejudice. *Long*, *supra*.

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's remarks. Because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Affirmed.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello